

# **John E. Bell v. U.S. General Accounting Office**

**Docket No. 65-700-06-85**

**Date of Decision: September 15, 1986**

**Cite as: Bell v. GAO (9/15/86)**

**Before: Kaufmann, Presiding Member**

**Age Discrimination In Employment Act**

**Disparate Treatment**

**Sex Discrimination**

**Prima Facie Case**

## **DECISION OF THE PRESIDING MEMBER**

Petitioner, John E. Bell, applied for but was not selected for a GS-7 Evaluator position with the Denver Regional Office (DRO) of the Respondent agency, the General Accounting Office (GAO). Petitioner filed a Petition for Review with the GAO Personnel Appeals Board (PAB) that was dated on November 27, 1985. In his Petition for Review the Petitioner alleged that GAO discriminated against him based on his age, race and sex when he was not selected.

The hearing in this case was conducted by the undersigned on April 18, 1986 in Denver, Colorado. Both parties were represented by counsel and they were given a full opportunity to examine and cross-examine witnesses and to offer evidence. Each side filed post-hearing briefs.

### **1. BACKGROUND AND UNDISPUTED FACTS**

On October 1, 1984 the GAO issued a job opportunity announcement seeking applicants for GS-7 and GS-9 entry level Evaluators (Resp. Exh. 1). The announcement explained the duties of GAO and, more specifically, Evaluators. It set out the educational and/or work requirements for the GS-7 and GS-9 levels. The announcement also identified quality ranking factors (QRF) that would entitle applicants to receive additional credit for "education or experience which has provided skills in accounting, automated data processing, business or public administration." (Resp. Exh. 2)

GAO officials sent copies of the job announcement to (1) all individuals who inquired about GAO employment in Denver (either through headquarters or the local office), (2) placement offices at nine schools including local schools such as Denver University and schools farther away such as Alabama State University, (3) the U. S. Department of Agriculture (a tenant agency in the DRO office complex), (4) the Denver Urban League, and (5) the National Black Accountant Association, Denver Chapter (Pet. Exh. 4). According to the equal employment opportunity (EEO) investigation conducted in this matter, DRO recruiters conducted campus interviews with 111 total candidates that were only eligible for the GS-7 vacancies and chose 22 applicants for inclusion on the selection certificate (Pet. Exh. 8). The 22 application packages included notes made by the recruiters about the candidates performance at the

interview.

Petitioner learned of the evaluator vacancies from his wife and applied in November of 1984 (Tr. 22). Petitioner's SF-171 listed his work experience (predominantly as an underwriter with various insurance companies and two years of college) (Resp. Exh. 12).

On December 3, 1984 Petitioner telephoned DRO Regional Manager Gary Wyant. According to undisputed testimony, Mr. Wyant informed Petitioner that he was one of 47 on the best qualified list, but that he was not among the 26 chosen for selection interviews. Mr. Wyant called Petitioner the following day to confirm that his name was not on the list.

Petitioner contacted William Temler, the EEO counselor for DRO on December 5, 1984 and complained that the use of campus interviews discriminated against older applicants who were less likely to be in college (Tr. 27). On December 7, 1984 Mr. Temler notified Petitioner that he was added along with eight other best qualified applicants to the list of individuals who would be given a selection interview (Tr. 27).

On December 14, 1984 Petitioner was interviewed by Gilbert Bowers, then Assistant Regional Manager for Operations. The interview lasted 45 minutes (Tr. 28). About a week later Petitioner called Mr. Bowers and learned that he was not among the applicants who were offered positions by DRO. Petitioner subsequently filed an EEO complaint alleging age, race, and sex discrimination.

As relief Petitioner requests an award of attorneys fees and back pay based on the GS-7 wage rate from the time when the agency first hired the applicants on the best-qualified list in question and April 1, 1985 (the time Petitioner began his employment with the Internal Revenue Service). He also requests that the Presiding Member find that the campus interview practice is discriminatory (Pet. Brief at 9-10).

## 2. PETITIONER'S POSITION

Petitioner argued in his Petition for Review and at hearing that he was a victim of both age and sex discrimination. His post-hearing brief, however, focused on GAO's practice of giving first interviews on college campuses and its unfairness to older applicants. In this regard, Petitioner relies on the Presiding Member's taking "judicial notice" that the vast majority of the college population is under the age of 30. Older applicants, he argues, would be less likely to be attending college and, therefore, would not have the opportunity of a first interview on campus.

Petitioner asserts that this practice gave the selecting committee additional information about younger applicants (that is, the college applicant's performance at the first interview) which left older applicants at a disadvantage. This is evidenced, he contends, by the fact that 19 of the 22 applicants receiving first interviews were given final interviews as contrasted with only 5 of the 11 applicants who were not recruited from campuses (Pet. Exh. 8). Petitioner contends that two GAO witnesses, Mr. Bowers and Mr. Wyant, disagreed over whether all applicants were grouped together when decisions were made on who would receive final interviews.

Petitioner contends that the GAO practice of granting first interviews to those recruited at colleges had an "adverse impact" on himself and others in protected age groups of 40-70 years of age. In this regard he maintains that this practice violates 29 U.S.C. Section 633a which protects applicants for Federal government positions from discrimination based on age.

Having met his burden to show an adverse impact, Petitioner argues that GAO failed to establish that the practice is either "a business necessity" or is protected for other reasons. The Agency's argument that interviewing all the applicants was an inefficient use of resources is not, in his view, an adequate basis for justifying a practice that has a discriminatory impact. To support this, Petitioner cites Geller v. Markham 635 F.2d 1027 (2d Cir. 1980), cert. denied 451 U.S. 945 (1981) in which the court struck down a school district's cost-cutting policy of not hiring teachers with more than five years experience. According to Petitioner, the court held that this attempt at fiscal restraint had an adverse impact on older workers and was discriminatory. In the present case, he argues, the GAO assertion that giving first interviews only to college applicants in order to preserve resources fails as an adequate basis under the Geller precedent.

Assuming arguendo that GAO met its burden of establishing a valid basis for the practice, Petitioner contends that there are at least three suitable alternatives with lesser adverse impact. For instance, GAO could have (1) given all best-qualified GS-7 applicants first interviews, (2) interviewed none of them or (3) continued to give first interviews on campuses but offer final interviews to all best qualified candidates not interviewed on campus.

With regard to the race and sex discrimination allegation, Petitioner notes that GAO affirmative action goals for hiring black females were exactly met (Tr. 119, Pet. Exh. 6). The agency's claim that this was "purely happenstance", in his view, severely strained its credibility. In addition, GAO has not hired any white male GS-7 Evaluators during the three years covered in the survey prepared by DRO (Pet. Exh. 2).

### 3. GAO'S POSITION

GAO's basic contention is that the DRO set out to hire the best applicants available at the entry level. To accomplish this both Mr. Wyant and Mr. Bowers testified that all candidates at the GS-7 and GS-9 level were considered together (Tr. 51-55, 128). In addition, the Agency noted that the job announcement cited QRF's (accounting, automated data process and business or public administration) for which applicants received extra credit.

According to Agency witnesses, GAO was seeking applicants with the ability to evaluate large automated data processing systems and the internal controls in order to determine the system's effectiveness. Public administration experience was needed for the ability to analyze public policy and business administration because this major in college frequently has accounting courses (Tr. 50-51).

GAO contends that the review and selection process was fair to all candidates and was not discriminatory in any way. The DRO's decision to recruit on campuses was reasonable based on the kinds of skills and background it was seeking. Nevertheless, GAO notes that this was not the only method of recruitment. The announcement was posted locally and sent to individuals who had previously inquired about GAO vacancies.

Contrary to Petitioner's allegations, GAO denies that the use of the campus interview somehow disadvantaged Mr. Bell. In this regard, Mr. Bowers and Mr. Wyant testified that an applicant was not disadvantaged by not having a campus interview; in fact, an interview could hurt an applicant as well. Mr. Bowers testified, moreover, that those who did not receive an initial interview were compared with each other in deciding whether they would receive a final "selection" interview (Tr. 106-109).

GAO also defended the DRO decision not to interview all the applicants on the Best-Qualified list. The selection certificate, it notes, states that "applicants" may or may not be interviewed (Resp. Exhs. 2 and 3).

According to the Agency, Mr. Bowers testified that he interpreted this language to mean that he need not interview everyone on the BQ list and that this was in keeping with past practice. (Tr. 121-24). Mr. Wyant further stated that it would be unreasonable to expend the agency resources to interview so large a group (Tr. 149-150). Since no evidence was presented by Petitioner to rebut this interpretation by Mr. Bowers, the Respondent argues that his version must stand.

With respect to the actual selections, GAO presented evidence concerning the qualifications of Petitioner, all eight candidates who were extended offers, and three other applicants who were not extended offers. Everyone of those selected candidates, it asserts, had at least a bachelors degree majoring in the accounting or computer area, a high grade-point average (GPA), and significant, relevant work experience. They all had strong credentials in the QRF areas (Tr. 62-63, 65, 78). The three candidates that were not selected all had high grade-point averages (GPA) and either an advanced degree or some significant work experience (Tr. 82-86). Petitioner, on the other hand, left college on academic probation with a GPA below 2.0 in Electrical Engineering. GAO contends that while he has significant work experience, he has no qualifications in the QRF areas. GAO contends that Petitioner was interviewed in the same fashion as the other applicants and he received equal and fair consideration. He simply was not as well qualified as the other candidates who were selected (Tr. 78-81).

GAO also challenges Petitioner's statistical evidence of discrimination. According to Petitioner's own evidence, DRO did not discriminate against those over 40 (Pet. Exh. 2). The chart in question shows that of the 26 new hires at DRO between January 1983 and December 1986, three were over the age of 40 and five more were between 35 and 40 years of age. Respondent asserts that these numbers are certainly not out of line given the fact that these are entry level positions which ordinarily do not attract a great number of applicants over the age of 40.

#### 4. DISCUSSION AND ANALYSIS

Most courts have held that proving a case of age discrimination in employment is governed by the same analysis as that followed under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A prima facie case of age discrimination is established by showing that:

1. The plaintiff was in the protected age group;
2. The plaintiff was qualified;
3. The plaintiff was nevertheless adversely affected by an employment decision or practice of the employer; and
4. The employer sought or hired a person under 40 with the same or similar qualifications as the plaintiff.

In addition to the above showing, the courts usually require that the plaintiff show that there was a relationship between the adverse action and age. That is, the plaintiff is required to provide some evidence which creates an inference of discrimination. See, Toussaint v. Ford Motor Co., 581 F.2d 812, 815 (10th Cir. 1978). Statistical evidence of discriminatory conduct or direct or circumstantial evidence of discriminatory intent will suffice to show that age was a factor in the decision by the employer, and thus,

will cement the prima facie case. Mistretta v. Sandia Corp., 649 F.2d 1383 (10th Cir. 1980).

Once plaintiff has established a prima facie case, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for taking the adverse action against plaintiff. If the defendant provides such a basis, then the burden shifts back to the plaintiff to show pretext. Plaintiff must carry this burden by showing that the defendant's proffered reason for rejecting him is unworthy of credence. McDonnell Douglas, 411 U.S. at 804. In an age discrimination case, the plaintiff need not prove that the reasons offered by the defendant are false if he proves that age was also a basis for his rejection, and that it was the factor that made a difference (that is "but for" age considerations the plaintiff would have been selected). EEOC v. Prudential Federal Savings and Loan Ass'n., 741 F.2d 1225 (10th Cir. 1984).

In the case before me, Petitioner clearly met the first two standards for a prima facie case. He was in the protected age group because he was over 40 and he was qualified for the GS-7 Evaluator position. Since the DRO's eight offers of employment were to individuals under the age of 40 (although one was 39) the fourth criteria was also met.

A question arises, however, as to whether Petitioner was "adversely affected" by the Agency's practice. According to Petitioner, the offensive conduct was use of first interviews on campus and the resulting advantage it gave this group over non-campus applicants in obtaining second interviews.

Petitioner attempted to show that this practice was related to age through the use of judicial notice and statistical information. At the hearing the parties agreed, and I noted, that the "vast majority" of the student population is under the age of 30 and that there are people at college campuses over the age of 30 (Tr. 12). While this is a general axiom, the record before me does not indicate the actual age breakdown of those interviewed on campuses and those who applied through other sources. Furthermore, the scope of statistics offered is very narrow and limited. The numbers relied upon (final interviews given to 19 of 22 on-campus applicants and 5 of 11 off-campus) constitute a small sample of one selection process even though there was evidence that DRO had several hiring cycles between 1981 and 1985. There was no information regarding prior selection phases and whether there were disparities in selecting individuals for final interviews.

The record before me, moreover, indicates that 3 of the 26 selectees that DRO hired over the past five years were over the age of 40 and 5 more were over the age of 35. GAO argues persuasively that these are representative numbers (8 out of 26, or 30%) given the fact that these are entry-level positions that would not ordinarily attract older, more highly experienced workers. In short, there is simply not sufficient evidence to establish statistically that applicants over 40, as a class, were being discriminated against.

Not only were Petitioner's statistics limited and narrow, he did not convincingly show that the practice in question, college campus interviews, played any significant role in DRO's selection of applicants for second interviews. In this regard, both Mr. Bowers and Mr. Wyant gave unrebutted testimony that the campus interview was additional information that could work to a candidate's advantage or disadvantage (Tr. 109, 117). Mr. Wyant, in fact, cited an instance where an applicant was not given a final interview because of his earlier performance at the campus interview (Tr. 51). I find this unrebutted testimony provides substantial evidence that the practice in question does not have an adverse impact on a candidate not receiving campus interviews. In addition, Mr. Bowers testified that he compared those who had first interviews with each other and compared those who had no first interview with others similarly situated (Tr. 107, 116). While Petitioner alleges that Mr. Wyant contradicted this testimony a review of the record discloses that he was responding to later selection processes and could not specifically recall if there were

applicants who had no first interviews in these later selections (Tr. 145-146). He never specifically addressed the selection process involving Petitioner. I find no basis, therefore, for drawing an adverse credibility determination on this point.

Petitioner, moreover, had additional difficulties sustaining his position. While he argues the benefits of a first interview, he, along with eight others, were added to the list of applicants receiving second interviews. Assuming he could show the adverse effect of the practice, therefore, it had no practical impact on him.

Even if Petitioner established a prima facie case of age discrimination, GAO offered legitimate non-discriminatory reasons for its actions. The decision not to give everyone second interviews was based on limited resources and past practice. Petitioner was given a final interview but not selected because he was not among the most qualified. None of these reasons involves age. They were supported, moreover, by the un rebutted testimony of GAO witnesses concerning the history of the selection process and the application package. An examination of the later evidence supports Respondent's contention that Petitioner's qualifications were inferior to those of all of the selectees. He had no college degree, specialized training or work-related experience (Resp. Exh. 12). In contrast, all the selectees had degrees, high grade-point averages and experience in accounting or computers (Tr. 62-78) (Resp. Exhs. 4-11). There were other applicants, moreover, who were not selected that were under the age of 40 and had superior credentials.

Petitioner offered no persuasive evidence that management's actions, including the campus interview, were in any way related to his age. As noted earlier, Petitioner's statistical evidence was not even sufficient to establish a prima facie case. Certainly it offers no basis for persuasively showing that the reasons offered by DRO for its actions were pretextual in nature.

Petitioner offered little evidence or argument in support of his race and sex discrimination claim. Nevertheless, it was a part of the proceeding and it was considered. Since Petitioner is a white male, this would be a "reverse discrimination" case. Respondent argued persuasively that in such cases courts have required plaintiffs to establish a prima facie case by showing that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." Lanphear v. Prokop, 703 F.2d 1311 at 1315. In this case, Petitioner offered no evidence of such circumstances.

Even if Petitioner could show a prima facie case regarding his failure to be selected, Respondent still articulated a legitimate non-discriminatory reason for his non-selection. As noted earlier, DRO persuasively showed that Petitioner was significantly less qualified than the selectees. The mere fact that the selection of several black females met the Agency's affirmative action goals does not, in my view, constitute sufficient basis to show that management's actions were pretextual.

## 5. ORDER

It is my conclusion that the record will not support a finding that DRO's practice of giving campus interviews had an adverse impact on applicants over the age of 40, nor will it support a finding that the Petitioner's non-selection was the result of discrimination by reason of age, race or sex. I, therefore, order that the petition is denied.